

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Optical Telecommunications, Inc.) MB Docket No. 14-258
Complaint Concerning Retransmission of) CSR 8895-C
WXCW(TV), Naples, FL)

To: The Commission

**REPLY TO OPTICALTEL’S OPPOSITION TO APPLICATION
FOR REVIEW OF DISH NETWORK L.L.C.**

DISH Network L.L.C. (“DISH”) respectfully submits this Reply to the Opposition¹ filed by Optical Telecommunications, Inc. and HControl Corporation (collectively “OpticalTel”). Commission precedent shows that DISH’s response to the Bureau’s Letter of Inquiry was sufficient to make DISH a party. Most importantly, DISH is directly aggrieved by the *Order on Reconsideration*,² an order that mentions DISH more than 20 times and which concludes by appearing to impose a burden on DISH—the retransmission consent requirement—that it should not have to bear in the circumstances presented.

OpticalTel argues that DISH was acting as a multichannel video programming distributor (“MVPD”) instead of a transport provider for certain local broadcast stations for OpticalTel to distribute to its end user customers. But OpticalTel rests this argument on a factual inaccuracy: that it did not pick the contractual “transport” option offered by DISH. In fact, OpticalTel had

¹ Optical Opposition to Application for Review, MB Docket No. 14-258 (May 4, 2017) (“Opposition”).

² *Optical Telecommunications, Inc. Complaint Concerning Retransmission of WXCW(TV), Naples, FL, Order on Reconsideration*, MB Docket No. 14-258, DA 17-265 (MB Mar. 20, 2017) (“*Order on Reconsideration*”).

chosen that option during certain time periods, as shown by the evidence in the proceeding below and recognized by the initial Media Bureau *Order*.³

OpticalTel also tries to fashion a new standard for determining if a satellite carrier is acting as an MVPD or as a passive carrier, a standard “focus[ed] on the nature of the signals being delivered, and the recipient’s rights and business activities relating to those signals.”⁴ But a standard already exists in the FCC’s precedent. It is whether the transmission is “with respect to [home satellite dish] sales.” Neither OpticalTel nor the Bureau may revise the Commission’s test.

Finally, OpticalTel wrongly claims it acted as a mere “agent” of DISH. In fact, OpticalTel is easily distinguished from the types of entities, such as big box electronic stores, that the Commission contemplated when it found that the retransmission consent requirement does not fall on the agent of an MVPD. Rather, OpticalTel is a distributor in its own right and by its own admission—a distributor offering “pay cable” service, as it states in filings with the Copyright Office.

I. DISH’S PARTY STATUS IS CONFIRMED BY COMMISSION PRECEDENT AND THE *ORDER ON RECONSIDERATION* DIRECTLY AGGRIEVED DISH

Commission precedent demonstrates that DISH’s response to the Media Bureau’s Letter of Inquiry⁵ qualifies it as a party entitled to file an Application for Review. Specifically, in *Citicasters*, Citicasters’ only participation in the proceeding had been a response to a letter of

³ See *Optical Telecommunications, Inc. Complaint Concerning Retransmission of WXCW(TV), Naples, FL, Order*, 31 FCC Rcd. 8952, 8956 ¶ 12 (MB Aug. 15, 2016) (“*Order*”).

⁴ Opposition at 12.

⁵ See Letter from Alison Minea, DISH, to Marlene Dortch, Secretary, FCC, MB Docket No. 14-258 (Mar. 3, 2016) (“DISH LOI Response”).

inquiry.⁶ The Commission ruled that was not enough, but only because it had occurred before the beginning of the proceeding. The direct inference is that it would be enough if received during the proceeding, as was the case here. Indeed, both OpticalTel and the broadcaster, Sun Broadcasting, Inc., the licensee for WXCW, appear to recognize DISH's party status, as they have served pleadings on DISH.⁷

Most importantly, DISH is aggrieved by the *Order on Reconsideration*, and thus may apply for review regardless of party status.⁸ The *Order on Reconsideration*, among other things, concludes by appearing to impose a burden on DISH—the obligation to obtain retransmission consent in future circumstances akin to the relationship between DISH and OpticalTel.⁹

II. OPTICALTEL WAS NOT A DBS RESELLER WITH RESPECT TO WXCW

OpticalTel's argument¹⁰ that DISH was acting as an MVPD, and that OpticalTel, for its part, was acting as a mere agent with respect to WXCW, is factually inaccurate. As the *Order* recognized: “[w]e note with approval OpticalTel's swift action to adopt the transport option with retransmission consent [for WXCW] once DISH stated that its existing transport option did not include a retransmission consent component as well as its asserted willingness to pay any

⁶ *Citicasters Licenses, Inc., Memorandum Opinion and Order*, 17 FCC Rcd. 1997, 1999 ¶ 5 (2002).

⁷ *See, e.g.*, Letter from Wayne Johnsen, Counsel to Sun Broadcasting, Inc., to Marlene Dortch, Secretary, FCC, MB Docket No. 14-258 (Mar. 14, 2016); Letter from Arthur Harding, Counsel to Optical Telecommunications, Inc. and HControl Corp., to Marlene Dortch, Secretary, FCC, MB Docket No. 14-258 (Mar. 3, 2016).

⁸ *See* 47 C.F.R. § 1.115.

⁹ *Order on Reconsideration* ¶ 5.

¹⁰ Opposition at 10 (“[I]t is clear that OpticalTel's [sic] fits squarely within the category of authorized sales agents that sell DBS service on behalf of the DBS operator[.]”).

retransmission consent fees that were in arrears.”¹¹ That finding was based on the Bureau’s review of the Bulk Programming Services Agreement between DISH and OpticalTel for the Sail Harbour location. The *Order on Reconsideration* left undisturbed the Media Bureau’s factual finding that OpticalTel elected the transport option under its contract with DISH,¹² despite OpticalTel’s objection in its Petition for Reconsideration.¹³

In 1993, the FCC established a straightforward standard for determining whether, in a specific circumstance, an entity like DISH is acting as an MVPD or, on the other hand, a transport services provider. In its *Broadcast Signal Carriage Order*, the Commission determined that, “with respect to [home satellite dish] sales,” DISH is the MVPD even when it employs the type of retail agents discussed in that order, “e.g., program packagers, equipment distributors, and satellite equipment retailers.”¹⁴

But instead of applying the standard the Commission established in the *Broadcast Signal Carriage Order*, OpticalTel proposes amorphous criteria such as “the nature of the signals being delivered” and “business activities relating to those standards,” and argues that the FCC’s phrase “with respect to [home satellite dish] sales” appears to be “a meaningless distinction.”¹⁵ But OpticalTel cites no authority to support its revision of that standard, because there is none.

¹¹ *Order*, 31 FCC Rcd. at 8956 ¶ 12.

¹² The *Order on Reconsideration* declined to discuss the contracts between the parties, and only stated that the *Order* “erroneously focused on the factual question of whether DISH provided OpticalTel only with transport services and not with the right to retransmit WXCW’s signal.” *Order on Reconsideration* ¶ 5.

¹³ OpticalTel Petition for Reconsideration, MB Docket No. 14-258 at 2-9 (Sept. 14, 2016).

¹⁴ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues, Report and Order*, 8 FCC Rcd. 2965, 2997 ¶ 131 (1993) (“*Broadcast Signal Carriage Order*”).

¹⁵ Opposition at 12-13.

The Commission should also reject OpticalTel’s attempt to place significance on the type of dish used to receive the signal.¹⁶ The size or description of the satellite antenna used for the transmission and receipt of signals does not matter, contrary to OpticalTel’s view.¹⁷ Satellite carriers can use both small and large dishes to deliver signals to cable operators; what matters is whether the transmission is to home satellite dishes on the properties at issue here.

Finally, OpticalTel wrongly asserts that the *Broadcast Signal Carriage Order* holds that satellite carriers “typically” license third parties to resell their services to “MDUs or private community contexts.”¹⁸ There is nothing in the *Broadcast Signal Carriage Order* to support that reading, nor does OpticalTel offer any support for its statements. The *Broadcast Signal Carriage Order* observes that, in addition to home satellite dish sales, satellite carriers may also license a variety of entities such as “program packagers, equipment distributors, and satellite equipment retailers . . . to sell the signals on their behalf.”¹⁹ By contrast, OpticalTel’s status is shown by its own filings with the Copyright Office under Section 111 of the Copyright Act, 17 U.S.C. § 111: in declaring itself a cable system for the purposes of that section, OpticalTel goes further and describes itself as offering “pay cable” service.²⁰

III. CONCLUSION

For the foregoing reasons, the Commission should grant DISH’s Application for Review.

¹⁶ Opposition at 2 n.1 (“Broadcast signals retransmitted by DISH are received at a home satellite dish located on the property[.]”). But OpticalTel retransmits the signal received from that central dish by other means to individual residences.

¹⁷ Opposition at 2, 12.

¹⁸ Opposition at 9.

¹⁹ *Broadcast Signal Carriage Order*, 8 FCC Rcd. at 2997 ¶ 131.

²⁰ OpticalTel Answer, MB Docket No. 14-258, Attachment 4 (Apr. 14, 2015).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th of May 2017, I caused true and correct copies of the foregoing Application for Review to be served by first class U.S. mail and electronic mail upon the following counsel:

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